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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In re Applications of ) MM Docket No. 93-42  
MOONBEAM, INC. ) File No. BPH-911115MG  
GARY E. WILSON ) File No. BPH-911115MO  
For a Construction Permit for a )  
New FM Station on Channel 265A )  
Calistoga, California )  
To: Administrative Law Judge )  
Edward Luton )

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**MASS MEDIA BUREAU'S COMMENTS ON  
JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT**

1. On January 13, 1995, Gary E. Wilson ("Wilson") and Moonbeam, Inc. ("Moonbeam") filed a joint request for approval of settlement agreement. On January 19, 1995, Wilson filed a First Supplement to the Joint Request for Approval of Settlement Agreement. The Mass Media Bureau hereby offers its comments in opposition to the joint request, as supplemented.

2. The proposed agreement contemplates the dismissal of the Wilson application in exchange for reimbursement of expenses in the amount of \$120,000 from Moonbeam. In addition to reimbursement, the agreement calls for an additional payment by Moonbeam to Wilson of \$143,000 in exchange for an agreement by Mr. Wilson not to apply for or buy another station within the 1 mv contour of the Calistoga station (hereinafter "non-compete agreement"). The parties supply appraisals by Mark Jorgenson and Americom of the value to Moonbeam of Mr. Wilson's agreement.

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Jorgenson concludes that the agreement is worth \$180,000 and Americom values the agreement at \$140,000. The settlement agreement contemplates that if the agreement is not approved in toto, the settlement agreement will be terminated. Finally, Wilson provides documentation establishing reimbursable expenses in the amount of \$124,760.

3. Section 73.3525 of the Commission's Rules limits the money or other consideration an applicant may receive for dismissing its application to its "legitimate and prudent expenses." The Mass Media Bureau opposes approval of the agreement because the non-compete agreement would provide Wilson with consideration in excess of that permitted by Section 73.3525.<sup>1</sup> Furthermore, Wilson's appraisals are not reliable to establish the value of the non-compete agreement. Unlike appraising the value of an ongoing radio business, there are no prior sales on which an appraisal of the value of an agreement not to compete can be based. Consequently, the appraisals are necessarily based on speculation or bald assertions. Jorgenson, in his appraisal, for example, concludes that the "incremental revenue realized by the Calistoga station precisely because Mr. Wilson is prohibited from competing for three years would be perhaps 10% of the station's total revenue." (emphasis supplied).

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<sup>1</sup> Generally, the Commission does not favor agreements not to compete and has disapproved of them except where they are limited in duration and geographic scope. Nirvana Radio Broadcasting Corporation, 4 FCC Rcd 2778 (1989).

Perhaps it would be something less and perhaps it would be nothing. Similarly, the Americom appraisal claims that "approximately 20% of the value of station transactions of this nature are attributable to agreements similar to [this one]." The appraisal does not, however, provide any examples of transactions such as the instant one where such an agreement was struck at the 20% value.<sup>2</sup> Consequently, neither appraisal is sufficient to allow the the Commission to conclude that approval of the non-compete agreement would be consistent with the limits set forth in Section 73.3525 of the Rules.

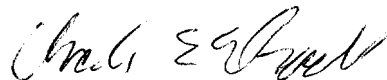
4. The joint request and supporting materials submitted by petitioners are otherwise in conformity with the requirements of Section 73.3525 of the Commission's Rules, which implement Section 311(c)(3) of the Communications Act of 1934, as amended. Specifically, the requesters have established that approval of the agreement is in the public interest and that neither of their applications was filed for an improper purpose. Additionally, except for the non-compete agreement, the parties have furnished the required full explanation and justification of their exchange of consideration.

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<sup>2</sup> Because markets vary greatly in terms of size and competition and individuals vary greatly in terms of experience and ability, it is unlikely that any compelling showing in this regard could be made.

5. In sum, the Bureau opposes approval of the settlement agreement because it would result in Wilson receiving monetary consideration in excess of that permitted by Section 73.3525 of the Commission's Rules.

Respectfully submitted,  
Roy J. Stewart  
Chief, Mass Media Bureau



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February 1, 1995

**CERTIFICATE OF SERVICE**

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau certifies that she has on this 1st day of February 1995, sent by regular United States mail, U.S. Government frank, copies of the foregoing **"Mass Media Bureau's Comments on Joint Request for Approval of Settlement Agreement"** to:

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